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Noraimi bt Alias v Rangkaian Hotel Seri Malaysia

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HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–707 OF 2006
MARY LIM JC
10 JULY 2009

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Contract — Formation — Agreement — Relationship of franchisor and franchisee — Rights and obligations in franchise relationship — Application of the Franchise Act 1998 irrespective of whether franchise agreement was made — Whether franchise agreement to be read subject to the Franchise Act 1998

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Contract — Formation — Breach — Renewal of franchise agreement — Refusal of franchisor to renew franchise after expiry of extended franchise period — Whether expiration of franchise agreement justified refusal to renew — Whether refusal to renew amounted to breach of franchise agreement

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The defendant as the franchisor, owned the exclusive franchise rights to the hotel chain 'SERI MALAYSIA'. The defendant had appointed the plaintiff to manage its hotel at Kuantan, Pahang and the parties entered into separate franchise and premises management agreements on 18 April 1995. The initial term of the franchise was for eight years, from 21 January 1995–21 January 2003. The agreement provided for a renewal of the franchise for another term of eight years subject to terms and conditions. Before the expiry of this first term, vide letter dated 7 January 2003 the defendant informed the plaintiff of its decision to extend the franchise by three years. The defendant informed the plaintiff the further renewal of the franchise was under consideration pending certain queries pertaining to the plaintiff's management and financial system of the franchise. Subsequently, the defendant informed the plaintiff that both the franchise and premises management agreements which had expired on 21 January 2006 would not be renewed with effect from 1 June 2006. The plaintiff then sued the defendant for breach of both the agreements. The issue arising for decision was whether the non-renewal of the franchise was a breach of agreement by the defendant or an exercise of a right conferred on the defendant under the terms and conditions of the franchise agreement. The plaintiff contended that the non-extension or non-renewal of the agreements was a breach of agreement and a violation of the safeguards under the Franchise Act 1998 ('the Act'). The defendant claimed that the franchise had simply come to an end of its term and the defendant had decided not to renew. The defendant also claimed that the Act did not apply

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because the franchise and the premises management agreements were both entered into prior to the coming into force of the Act.

Held, allowing the plaintiff's claim with costs:

(1) Although the relationship between franchisor and franchisee is basically contractual in nature, the interpretation of the rights and obligations arising from that relationship needs to be read in the context of the Franchise Act 1998. The application of the Act is not dependent on when a franchise agreement is made. Contractual arrangements must be read subject to the Act and give way where there is conflict (see paras 15 & 19).

(2) The defendant had extended the franchise by three years, till 21 January 2006. This extension was agreed to by the plaintiff. At this point the franchise agreement had been mutually varied. But only insofar as introducing the concept of extension of the initial term of franchise from eight to 11 years. Therefore, subject to the conditions for renewal being met, the plaintiff could look forward to a renewal of eight years of franchise term (see para 25).

(3) Although the defendant could refuse to renew without assigning any reason, here it had indicated its reasons for non-renewal. Once reasons had been offered in the form of documentary evidence, it could not be ignored as it showed the intent of the parties at the material time. Such reason is not within cll 3.2 or 3.3 which concerned conditions for renewal. The expiration of the franchise agreement may be a reason for termination of the franchise but not for refusal to renew. Therefore the defendant's refusal to renew was invalid as it violated the terms of the franchise agreement (see para 29).

(4) No compensation was offered. The notice of the intention not to renew was also insufficient. Less than two month's notice was given. The non-renewal of the franchise was invalid under both the franchise agreement and the Act (see para 31).

(5) The franchise was not renewed for a simple reason — the franchise had expired. It was inappropriate if not wrong for the defendant to now contend it was entitled to refuse not to renew the franchise agreement by reason of the breaches when the evidence clearly showed otherwise (see para 35).

(6) The provision the amount of compensation is dependent on the facts. In this case, the amount due must be what the plaintiff would have received had the defendant complied with the terms of the agreement. That being so, it was only appropriate that the plaintiff be awarded

A compensation for the loss of profit that she would have received for the period of renewal expected. The plaintiff expected a five year renewal (see para 38).

[Bahasa Malaysia summary

B

Defendan sebagai francaisor mempunyai hak eksklusif terhadap rangkaian hotel 'SERI MALAYSIA'. Defendan telah melantik plaintif untuk menguruskan hotelnya di Kuantan, Pahang dan pihak tersebut telah
C menandatangani perjanjian-perjanjian francais dan pentadbiran premis berasingan pada 18 April 1995. Tempoh permulaan francais ialah untuk lapan tahun, dari 21 Januari 1995–21 Januari 2003. Perjanjian tersebut memperuntukkan pembaharuan francais untuk tempoh lapan tahun selanjutnya tertakluk kepada terma dan syarat. Sebelum tempoh pertama
D tamat, melalui surat bertarikh 7 Januari 2003 defendan memaklumkan kepada plaintif keputusannya untuk melanjutkan francais kepada tiga tahun. Defendan memaklumkan plaintif pembaharuan lanjut francais berada di bawah pertimbangan sementara menunggu siasatan mengenai sistem pentadbiran dan kewangan francais plaintif. Kemudiannya, defendan
E memaklumkan plaintif bahawa kedua-dua perjanjian francais dan pentadbiran premis yang telah tamat pada 21 Januari 2006 tidak boleh diperbaharui berkuat kuasa sebelum 1 Jun 2006. Plaintif kemudiannya menyaman defendan kerana melanggar kedua-dua perjanjian. Isu yang timbul untuk diputuskan ialah sama ada francais yang tidak diperbaharui
F merupakan pelanggaran perjanjian oleh defendan atau merupakan hak yang diberikan ke atas defendan melalui terma dan syarat perjanjian francais. Plaintif menghujah bahawa perjanjian yang tidak dilanjut atau tidak diperbaharui merupakan pelanggaran perjanjian dan melanggar perlindungan di bawah Akta Francais 1998 ('Akta'). Defendan mendakwa
G bahawa francais tersebut telah tamat tempoh dan defendan telah membuat keputusan untuk tidak memperbaharuinya. Defendan juga mendakwa bahawa Akta tersebut tidak boleh diguna pakai kerana kedua-dua perjanjian francais dan pentadbiran premis ditandatangani sebelum Akta tersebut berkuat kuasa.

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Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Walaupun hubungan antara fancaisor dan francaisi bersifat kontraktual,
I interpretasi hak dan tanggungan yang timbul daripada hubungan tersebut perlu dibaca dalam konteks Akta Francais 1998. Penggunaan Akta tidak bergantung kepada bila perjanjian francais dibuat. Urusan kontraktual perlu dibaca tertakluk kepada Akta dan dikecualikan apabila terdapat konflik (lihat perenggan 15 & 19).

(2) Defendan telah melanjutkan francais kepada tiga tahun, sehingga 21 Januari 2006. Lanjutan ini dipersetujui oleh plaintif. Pada masa ini, perjanjian francais telah diubah bersama-sama. Tetapi ia cuma memperkenalkan konsep lanjutan francais dari lapan kepada 11 tahun. Oleh itu, tertakluk kepada syarat-syarat untuk pembaharuan, plaintif boleh mendapatkan pembaharuan lapan tahun tempoh francais (lihat perenggan 25).

(3) Walaupun defendan boleh menolak daripada memperbaharui perjanjian tersebut tanpa memberikan apa-apa alasan, di sini ia menyatakan alasan-alasan untuk ketidakpembaharuan. Apabila alasan-alasan dinyatakan dalam bentuk keterangan dokumentar, ia tidak boleh tidak diendahkan memandangkan ia menunjukkan tujuan pihak-pihak pada masa material. Alasan-alasan tersebut tidak terangkum dalam klausa 3.2 atau 3.3 berkenaan syarat-syarat untuk pembaharuan. Penamatan perjanjian francais boleh menjadi alasan untuk menamatkan francais tetapi bukan keengganan untuk memperbaharuinya. Oleh itu keengganan defendan untuk memperbaharui adalah tidak sah memandangkan ia telah melanggar terma-terma perjanjian francais (lihat perenggan 29).

(4) Tiada ganti rugi ditawarkan. Notis niat untuk tidak membaharui juga tidak mencukupi. Notis diberikan kurang dari dua bulan. Ketidakpembaharuan francais tersebut tidak sah di bawah perjanjian francais dan Akta (lihat perenggan 31).

(5) Francais tidak diperbaharui kerana alasan yang mudah — francais telah tamat. Defendan tidak sepatutnya menghujah bahawa sekarang dia berhak untuk tidak memperbaharui perjanjian francais dengan alasan pelanggaran apabila keterangan dengan jelas menunjukkan sebaliknya (lihat perenggan 35).

(6) Peruntukan jumlah ganti rugi bergantung kepada fakta. Dalam kes ini, jumlah yang perlu dibayar mestilah apa yang sepatutnya diterima oleh plaintif sekiranya defendan mematuhi terma-terma perjanjian. Oleh itu, plaintif wajar diawardkan ganti rugi untuk kehilangan keuntungan yang sepatutnya diterimanya bagi tempoh pembaharuan yang dijangkakan. Plaintif menjangkakan pembaharuan selama lima tahun (lihat perenggan 38).]

Notes

For a case on breach, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 3642.

For cases on agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3620–3640.

Cases referred to

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675, CA (not folld)

Lim Chon Beng v Pulau Kembar Sdn Bhd [2005] 7 MLJ 180, HC (not folld)

Morris v Baron & Co [1918] AC 1, HL (not folld)

Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292; [1995] 1 CLJ 491, CA (refd)

Tong Aik (Far East) Ltd v Eastern Minerals & Trading (1959) Ltd [1963] MLJ 322, HC (not folld)

Legislation referred to

Contracts Act 1950 s 63

Franchise Act 1998 ss 6, 28, 29, 30, 31, 31(2), (3), 32, 32(a), (b), 34, 58, 61

Zainur Zakaria (Zainur Zakaria & Co) for the plaintiff.

Abd Shukor Ahmad (Shukor Baljit & Partners) for the defendant.

Mary Lim JC:

[1] This claim arises from a franchise arrangement between the parties. Franchising appears to be one of today's preferred methods of doing business. The term 'franchise' of French origin has historical meaning related to voting rights but for the purpose of this case and in the context of modern day commerce, it refers to the 'privilege or exceptional right, granted to person, corporation, etc; right to market company's goods or services in particular area (see *Reader's Digest Great Encyclopaedic Dictionary*, Oxford University Press 1976). Almost any commodity or service can form the subject matter of a franchise. From food to apparel, automobiles to petrol. Perhaps, the most popular of franchises must be the food industry of which the Malaysian market is replete with fast food examples like the burger chains of McDonald's and Burger King etc, pizza chains of Pizza Hut, Domino's Pizza etc, and more recently the evolvement of doughnut chains of Dunkin' Doughnut, J Co, Big Apple, Krispy Kreems etc. The hotel industry which is the service franchised in this case is not excepted.

[2] One of the key elements and attractions of franchising is the ready availability of well known and established concepts of business regardless of the subject matter of the franchise. Formats are on templates, provisions and distributions of territory, control, support, responsibilities including most importantly financial are to large extents, well-demarcated. This method of business encourages goodwill and consumer confidence as uniformity, expectations and maintenance of reputation are the hallmarks of franchise. With the flourish of franchise in the country, Parliament enacted specific legislation, the Franchise Act 1998 (Act 590) to regulate the law on franchise.

FACTUAL BACKGROUND

[3] The defendant, the franchisor owns the exclusive franchise rights to a medium cost hotel chain under the name of 'SERI MALAYSIA'. According to the Auditor General's report (p 83 bundle B) this franchise project was allocated RM100m under the Sixth Malaysia Plan. A company known as Gateway Inn Management Sdn Bhd was contracted to manage the franchise. This chain of hotels can be found at various locations along the length and breadth of Peninsula Malaysia. A hotel guest stepping into any of those Seri Malaysia hotels can therefore expect sameness in many respects. For its site at Jalan Teluk Sisek, Kuantan, Pahang the defendant agreed that the plaintiff manage its hotel. For this purpose, the parties entered into separate franchise and premises management agreements both dated 18 April 1995.

[4] Under the franchise scheme, the premises, facilities and equipment are supplied by the defendant whereas the plaintiff manages the premise and business under the defendant's banner of SERI MALAYSIA.

[5] The initial term of the franchise was for a period of eight years, with effect from 21 January 1995 and expiring on 21 January 2003. The agreement provided for a renewal of the franchise for another term of eight years subject to terms and conditions.

[6] Before the expiry of this first term, vide letter dated 7 January 2003 the defendant informed the plaintiff of its decision to extend the franchise by three years, till 21 January 2006 subject to the terms and conditions as found in the franchise agreement dated 18 April 1995 (p 114 bundle A). The matter of the extension of the franchise had been discussed as early as 2001. This can be seen from minutes of the meeting between the franchisor and the franchisees on 8 June 2001 (exh P4). At another franchisees' meeting on 30 June 2004, the defendant announced its board of directors' decision to, in principle renew franchises for five years.

[7] The plaintiff attended both meetings. So it was not surprising when on learning of other franchisees receiving letters on their renewals while she did not, she wrote to the defendant for her renewal of franchise (see letter dated 3 February 2005 p 149 bundle A). She sent another letter on 29 March 2005 when she failed to get any response from the defendant (p 160 bundle A).

[8] Around this time, the defendant was audited by the Auditor General. In the Auditor General's report (pp 69–213 bundle B) the plaintiff's and some other franchisees' management and financial system of the franchise came under scrutiny and comment. The defendant sought clarifications from the plaintiff on the matters raised in the audit — see letter dated 3 March

2005 p 150 bundle A. At the same time, by a separate letter dated 7 March 2005 the defendant informed the plaintiff the renewal of the franchise was under consideration. The plaintiff was also advised to clarify the matters requested in the earlier letter — see p 152 bundle A.

[9] A series of correspondence then ensued between the parties until the critical letter of 10 April 2006. By this letter, the defendant informed the plaintiff that both the franchise and premises management agreements which had expired on 21 January 2006 would not be renewed with effect from 1 June 2006 (p 180 bundle A): 'Sila ambil maklum bahawa Perjanjian Francais dan Perjanjian Pengurusan Premis yang bertarikh 18hb April 1995 yang telah luput tempoh sahnya pada 21hb Januari 2006 tidak akan diperbaharui mulai 01 Jun 2006. Justeru itu selaras dengan Klausa 7.1 Perjanjian Francais pihak kami akan mengambilalih operasi Hotel Seri Malaysia Kuantan daripada pihak puan.'

[10] What followed subsequently was correspondence and arrangements between the parties in respect of inventory lists so that the hotel could be properly handed back to the defendant.

[11] The plaintiff then sued the defendant for breach of both the franchise and premises management agreements. Amongst the reliefs sought were declaratory orders to the effect that the plaintiff was entitled to an extension or renewal of the franchise agreement and damages. At the trial, the plaintiff and the chartered accountant who audited her accounts testified. The defendant called three witnesses comprising its pengarah urusan and two officers from the National Audit Department who had conducted the audit.

ISSUE

[12] Whether the non-renewal of the franchise was a breach of agreement by the defendant or an exercise of a right conferred on the defendant under the terms and conditions of the franchise agreement.

SUBMISSIONS

[13] The plaintiff's contention is that the non-extension or non-renewal of the agreement on the reasons contained in letter of 10 April 2006 was a breach of agreement and a violation of the safeguards statutorily provided under the Act 590. In particular the plaintiff relies on ss 32 and 34 of Act 590.

[14] The defendant in response pleaded the franchise had simply come to an end of its term and the defendant had decided not to renew. Renewal was not as of right but was subject to cl 3.3 of the franchise agreement. The non-renewal was also occasioned by the plaintiff herself not giving the required 90 day written notice before the conclusion of the franchise agreement of intention to renew. The defendant also argued variation of the agreement by virtue of the extension of three years. The effect of such variation read together with s 63 of the Contracts Act 1950 meant that the original agreements do not have to be performed. Alternatively, the termination was occasioned by alleged breaches of agreements by the plaintiff. The breaches being violations of cll 6.23, 6.24, 6.31 and 6.33. In brief, these provisions in the franchise agreement prohibited the assignment of the management of the franchise and the involvement of third parties other than the plaintiff personally. As envisaged under cll 7.3 and 9.2, these violations of principal conditions of the franchise agreement allow the defendant to bring the franchise agreement to an end and gave the defendant the right not to renew the franchise.

FRANCHISE ACT 1998 (ACT 590)

[15] For obvious reasons, the issue of the application or otherwise of the Franchise Act 1998 (Act 590) must first be resolved. The intent of the Act has already been explored at the outset. According to its long title, the Act 590 is — 'An Act to provide for registration of, and to regulate, franchises, and for incidental matters.' The existence of this specific legislation is Parliament's appreciation of the impact franchises have on the general public as consumers. Although the relationship between franchisor and franchisee is basically contractual in nature the interpretation of the rights and obligations arising from that relationship needs to be read in the context of legislation.

[16] A quick perusal of the Act shows the regulation of franchise is through a system of registration of franchises. The importance of registration is reflected in the imposition of penalties. Unless the person, class of persons, business or industry is exempted from all or any of the provisions of the Act, including the requirement of registration, the failure to register before offering the franchise for sale is an offence. More importantly, there are statutory obligations for both franchisor and franchisee. These obligations extend to matters of termination, renewal and extensions of franchise which are the very issues in this case. In the context of this case, the franchise agreement takes a dimension beyond the simple private business relationship between the contracting parties to one that includes the interests of the consumer and good business practices. This is evident from the provisions of

s 28 concerning waiver, s 29 where the legitimate interests of the franchise system must be given due regard, and s 30 where the consumer's interest at all times must be protected.

[17] Learned counsel for the plaintiff contended that Act 590 applied because DW1, the pengarah urusan of the defendant said so. He also relied on s 61 of the Act.

[18] The defendant's equally succinct answer to this issue is — the Act does not apply because the franchise and the premises management agreements were both entered into prior to the coming into force of the Act. The agreements were made on 18 April 1995 whereas Act 590 came into effect on 8 October 1999 vide PU(B) 389/1999. The Act has no retroactive but prospective application.

[19] Having examined the legislation I find that contrary to the submission of learned counsel for the defendant, the application of the Act is not dependent on when a franchise agreement is made. This can be gathered from the long title and the body of the legislation which seeks to regulate franchises. Such regulation cannot be realised if it is dependent on the date of making of franchise agreement. The principle that in the absence of express words or necessary implication, statutes affecting substantive rights are prospective while those affecting procedure are retrospective is undoubtedly one of the basic tenets of statutory interpretation. This was reminded in *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292; [1995] 1 CLJ 491. However, at p 297 (MLJ); p 495 (CLJ) the Court of Appeal recognised the difficulty in application to any given case though this proposition may be simple to state. What is required in order to answer the question posed is to construe the statute as a whole. And that is precisely what I have done here. The application remains prospective in that it governs franchises and regulates relationships between franchisors and franchisees from the date of coming into force of the law. Contractual arrangements must be read subject to the Act and give way where there is conflict.

[20] I find support in this interpretation from s 61, a provision on savings and transitional matters. Section 61 states:

> Savings and transitional
>
> 61 A franchisor or a franchise broker who has granted or sold in or outside Malaysia a franchise to a franchisee before the commencement of this Act shall, not later than twelve months from the commencement, register his franchise with the Registrar in accordance with the prescribed procedure and requirements under this Act.

[21] Section 61 obviously is intended to apply to all franchises regardless of when the franchises were granted or sold. For franchises granted or sold prior to the coming into force of Act 590, there is a grace period of 12 months for registration to be effected. If there is failure to register by 8 October 2000 and unless the person, class of persons or business of industry was exempted from the requirements of registration under s 58, there would be a violation of s 6 which provides:

> Registration
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> 6
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> (1) A franchisor shall register his franchise with the Registrar before he can make an offer to sell the franchise to any person.
>
> (2) A person who fails to comply with this section commits an offence unless he has been exempted by the Minister under section 58 from the requirement to register under this section.

[22] To accept the submission of the defendant on this point will have the effect of defeating the intent and purport of the Act which is to regulate all franchises from the commencement date of the Act regardless of when the grant or sales were transacted.

[23] There is no evidence before me as to whether the defendant has registered within the time frame provided under s 61 or that the defendant has been exempted under s 58. In the circumstances, I must treat the defendant as not exempted from either the whole or any part of the application of the Act. That being so, Act 590 applies from 8 October 1999 even before the expiry of the first term of eight years of franchise. The obligations of the parties need to be considered in the light of the Act, in particular Part IV — conduct of parties and termination of franchise agreement.

EXTENSION, RENEWAL, TERMINATION OF FRANCHISE

[24] From the evidence adduced by both parties, there was much play over the use and interpretation of the terms 'extension', 'renewal' and 'termination'. Each has been distinctively deployed by the parties in the course of their relationship. I propose to deal with all three words. First from the perspective of the franchise agreement before considering the same issues under statute law. In view of my interpretation of the application of the Franchise Act 1998, the authorities submitted by the defendant such as *Tong Aik (Far East) Ltd v Eastern Minerals & Trading (1959) Ltd* [1963] MLJ 322 and *Morris v Baron & Co* [1918] AC 1 would not be appropriate. Such cases

A are of general application in the absence of specific legislation.

Extension

B **[25]** Dealing first with the word 'extension'. This word is in fact not found in the franchise agreement. It first arose at the meeting of 8 June 2001 and then in letter dated 7 January 2003. In that letter the defendant extended the franchise by three years, till 21 January 2006 subject to the terms and conditions as found in the franchise agreement dated 18 April 1995 (p 114 bundle A). This extension was agreed to by the plaintiff. I agree with the C submission of learned counsel for the defendant that at this point the franchise agreement had been mutually varied. But only insofar as introducing the concept of extension of the initial term of franchise from eight to 11 years. The other terms and conditions of the franchise agreement will continue to apply as is clearly stipulated in the letter of 7 January 2003. D This would include provisions on renewals. Therefore, subject to the conditions for renewal being met, the plaintiff can look forward to a renewal of eight years of franchise term.

E **[26]** In the context of Act 590, s 34 provides that extensions of franchise must be on similar and not less favourable conditions than the conditions under the previous franchise agreement. Section 34 reads:

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F (1) At any time before the expiration of the franchise term, a franchisee shall at his option give written notice to the franchisor to extend the franchise term.

(2) Except when a franchisee has breached the terms of a previous franchise agreement, a franchisor shall extend the franchise term to G another period id the franchisee has applied for the extension of term under subsection (1).

(3) A franchise agreement which franchise term has been extended shall contain conditions which are similar or not less favourable than the H conditions in the previous franchise agreement.

[27] Since the extension clearly provided for the existing terms and conditions to apply, this extension of three years accords with s 34 of Act 590 and is regular. I

Renewal

[28] Moving on to the issue of renewal. This was first broached at a meeting of franchisees on 30 June 2004. From the evidence of both parties it can be concluded that although the term was only for five years, the intention of the parties was to adhere to the original eight year term for renewal as envisaged under the franchise agreement. The minutes tendered reveal the defendant's proposal was for the earlier three year extension of the first term of franchise to be regarded as part of the eight year term of renewal: '… menyambung tempoh pembaharuan francais selama 5 tahun lagi yang menjadikan tempoh pembaharuan Francais adalah selama 8 tahun. Tempoh tersebut adalah termasuk tempoh perlanjutan selama 3 tahun yang telah diberikan sebelum ini. Namun begitu tempoh pembaharuan tersebut adalah tertakluk kepada merit setiap HSM.' — (p 137 bundle A). This proposal was accepted by the plaintiff and her acceptance is reflected in her own written applications for renewal. At no time did the plaintiff sought an eight year term of renewal. Once again, the franchise agreement has been varied but not to the extent of rendering the performance of the agreement no longer necessary as provided under s 63 of the Contracts Act 1950. Only the period of renewal of franchise was varied.

[29] However, as provided under the franchise agreement and as stated in the minutes just referred to, renewals are not automatic but dependent on the merits of each case. When the defendant informed the plaintiff of its intention not to renew the franchise agreement with effect 1 June 2006, it was because the franchise agreement had expired on 21 January 2006. Although the defendant may refuse to renew without assigning any reason (cl 3.4) here it indicated its reasons for non-renewal. Once reasons have been offered in the form of documentary evidence, it cannot be ignored as it shows the intent of the parties at the material time. And it can be readily seen that such reason is not within cll 3.2 or 3.3. These clauses concern conditions for renewal including the condition that there be no violation of any of the obligations set out in the franchise and management of premises agreements. The expiration of the franchise agreement may be a reason for termination of the franchise but not for refusal to renew. Therefore the defendant's refusal to renew is invalid as it violates the terms of the franchise agreement.

[30] Under s 32 of Act 590 it is an offence to not renew or extend a franchise without compensation in two circumstances. The two circumstances are: first, where the franchisee is barred by or the franchisor has refused to waive the operation of some restraint of trade clause in the franchise agreement six months before expiration of the agreement. Second, where the franchisee has not been given at least six months notice of the franchisor's intention not to renew the franchise. Bearing in mind the intent

A and application of Act 590, general duration of franchises terms (five years under Act 590 and eight in this instant case) where there would have been substantial human and financial outlay, it is easy to appreciate the need to require payment of compensation in the two circumstances identified in s 32. Other than the two circumstances described in s 32(a) and (b) there can be
B non-renewal or non-extension. Even in the two excepted circumstances, there can be non-renewals and non-extensions but, there must be compensation.

[31] In this case, no compensation was offered. The notice of the intention not to renew is also insufficient. Less than two month's notice was given.
C Though s 32 addresses the issue of non-renewals and non-extensions without compensation as amounting to offences, it would be contrary to public policy to interpret the refusal to renew as valid. The non-renewal of the franchise is therefore invalid under both the franchise agreement and Act 590.

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Termination

[32] In relation to termination, cl 7 of the franchise agreement provides for the right to terminate. This right arises inter alia when the term of franchise
E expires — cl 7.1. It is the submission of the defendant that this is precisely what happened in this case.

[33] It is undeniable the plaintiff has a right to terminate where either one of the situations under cl 7 arises. However, the facts do not bear evidence to
F termination but to a consideration of an application for renewal submitted by the plaintiff within the time period stipulated under the franchise agreement. Under cll 7.6 and 7.7 there are provisions on the requirement of notice to be given prior to termination. Although cl 7.7.2 allows the defendant to
G terminate under cl 7.1 automatically and without notice, the defendant gave notice. That is well and good. But after acknowledging that the franchise had expired on 21 January 2006 the notice proceeded to convey the defendant's decision not to renew the franchise with effect from a prospective date, 1 June 2006. Parties must be aware of an impending event which in this case is the
H expiry of the franchise and for which there is no application for renewal or extension. But from the facts that was not the case. Even the defendant was not aware. The intention of both parties appears to not allow the franchise to expire without more. Hence the plaintiff continuing with the franchise even after its expiry till the letter was sent on 10 April 2006.

I

[34] Section 31 of Act 590 prohibits termination before expiration date except for good cause. Depending on the type of 'good cause' termination may be with or without notice to remedy — see s 31(2) and (3). Since the facts reveal that this is not an instance of termination I need go no further.

[35] I do not need to consider the details relating to the alleged breaches or even the issue of breach as this is irrelevant. As revealed by the evidence, the basis for the defendant's decision not to renew was not occasioned by such alleged breaches. Despite conducting inquiries and obtaining clarifications, the defendant finally did not act nor rely on them as the basis for non-renewal or termination. The franchise was not renewed for a simple reason — the franchise had expired. This is evident from the letter of 10 April 2006 as well as the evidence of DW1. It would be inappropriate if not wrong for the defendant to now contend it is entitled to refuse not to renew the franchise agreement by reason of the breaches when the evidence clearly shows otherwise. The cases cited, *Lim Chon Beng v Pulau Kembar Sdn Bhd* [2005] 7 MLJ 180 and *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 would therefore be irrelevant to the facts of this case.

[36] Nevertheless, it is appropriate for me to make an observation. The breaches raised here are related to alleged violations of the obligations in cl 6 in the franchise agreement. Such obligations are in fact recognised as principal conditions — 'syarat utama' in cl 7.3.3. Under cll 7.7 and 9.2 there is no requirement to provide an opportunity to remedy such breaches or to give notice of termination for such breaches. Yet, notice to remedy was given. The giving of such notice is to me, an acknowledgment of the application and a compliance of the provisions of the Franchise Act, in particular s 30.

DAMAGE

[37] On the issue of damage, the claim is now focused on the loss of profits as manifested in the audited accounts of the plaintiff when she was managing the franchise in Kuantan. I accept the evidence of PW2 (independent auditor) which was not seriously challenged by the defendant. Audited accounts are one of the best if not the best evidence of the financial standing of any claimant. Although the audited accounts are those of a body corporate the plaintiff has given evidence that the company has since been under her sole proprietorship. I can therefore accept the audited accounts as hers.

[38] Although at first blush it may appear that if there was compliance of s 32 the damage granted would be compensation of six months' loss. However on closer examination of the provision the amount of compensation is still dependent on the facts. In this case, the amount due must be what the plaintiff would have received had the defendant complied with the terms of the agreement. That being so, it is only appropriate that the plaintiff be awarded compensation for the loss of profit that she would have received for the period of renewal expected. The plaintiff expected a five year renewal.

[39] The audited accounts show prior to 2006 the plaintiff enjoyed a steady increase in profit from the franchise; evidence that the project was at least meeting one of its objects of producing independent bumiputera entrepreneurs. From the audited accounts for three financial years (2002, 2003, 2004) the plaintiff enjoyed a total nett profit after tax of RM990,000. The average nett profit per year would be RM330,000 or RM27,500 per month. The plaintiff is therefore entitled to damages based on the average income of RM27,500 per month for five years. The defendant has not raised the issue of mitigation and there was no cross-examination on this. The court is not in any position to make any deduction.

[40] Accordingly, I allow the plaintiff's claim with costs and hold that the non-renewal to be in breach of the agreement and the provisions of the Franchise Act 1998. I further award the sum of RM27,500 per month for a period of two years together with interest at 4%pa from 21 January 2006 to date of judgment and thereafter at 8%pa to date of realisation and a further sum of RM27,500 per month for the balance period of three years without interest.

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundrum